NOTE

TYPES OF ACTIVITY ENCOMPASSED BY THE OFFENSE OF OBSTRUCTING A PUBLIC OFFICER

INTRODUCTION

The vast majority of jurisdictions in this country make criminal the act of obstructing a public officer.[1] The statutes establishing the offense can be broken down into two major categories:[2] the first punishing only interference with the functions of a public official engaged in serving process,[3] the second broadly penalizing one who "resists, delays, or obstructs a public officer in discharging, or attempting to discharge, a duty of his office . . . ."[4] Thus, on the face of the acts, a person who interferes with a police officer directing traffic would be subject to conviction under the second type of statute but not under the first.[5]

Various operative words are used in these general obstruction statutes of the several jurisdictions. The most common is "obstruct," but typical phrasing in statutes of the first category also includes "oppose or resist,"[6] "obstruct or resist,"[7] or "resist."[8] Typical of statutes in the second

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[1] See MILLER, CRIMINAL LAW § 153 (1934); HARRIS & WILSHIRE, CRIMINAL LAW 134 (18th ed. 1950); Comment, 6 ARK. L. REV. 46 (1951). For the most part the offense is statutory, but in some states it is considered a part of the common law. See, *e.g.*, Brown v. Commonwealth, 263 S.W.2d 238 (Ky. 1954).

[2] Several states apparently have no such general provision, although they have statutes specifically punishing acts which would elsewhere be punished under one of the types of general obstruction statute. See, *e.g.*, MASS. ANN. LAWS ch. 268, § 17 (1956); ORE. REV. STAT. § 162.360 (1953), penalizing one who aids a prisoner to escape from the custody of a policeman; compare State v. Johnson, 134 W. Va. 357, 59 S.E.2d 485 (1950) (arising under W. VA. CODE ANN. § 6015 (1955)), which held that aiding a prisoner to escape from a policeman constitutes obstruction of the policeman.

[3] A typical example of this type of statute penalizes anyone who "obstructs, resists or opposes a sheriff . . . or other person duly authorized, in serving . . . process or order of court." N.J. STAT. ANN. § 2A:99-1 (1953). Statutes which limit the offense to situations where the officer is serving process or arresting are in force in at least seventeen jurisdictions.

[4] N.Y. PEN. LAW § 1851. Statutes which prohibit obstruction where the officer is engaged in any duty of his office are in force in at least twenty-five jurisdictions.

[5] *Compare* State v. Wyckoff, 8 N.J. Misc. 149, 149 Atl. 124 (Sup. Ct. 1930), *with* Rex v. Goodman, [1951] 2 West. Week. R. (n.s.) 127 (B.C. Ct. App.). The limited scope of the process-server type of statute may not help defendant, however, since a court may hold that though the statute is inapplicable, defendant's actions are an offense at common law. State v. Simons, 108 Me. 239, 79 Atl. 1069 (1911).

[6] ALA. CODE ANN. tit. 14, § 402 (1940); IOWA CODE ANN. § 742.1 (1950); MISS. CODE ANN. § 2293 (1942); TENN. CODE ANN. § 39-3104 (1956).

[7] ARK. STAT. ANN. § 41-2801 (1947).

[8] N.D. REV. CODE § 12-0821 (1943).

category are the words "resists, delays or obstructs," [9] "impede," [10] "abuse," [11] "oppose" [12] or "deter." [13] But whatever the differences in phrasing, courts under a given statute tend to ignore the potentially different areas of conduct covered by particular words and to treat all of the operative words as subsumed within "obstruct," deemed the broadest and most inclusive.[14] The major problem presented by the statutes is that there is usually no attempt made to define or circumscribe the precise types of activities intended to be included in these vague and abstract terms.[15] And in the larger number of cases arising under them, the courts provide no analysis of the results they reach, but merely conclude that the particular activity in question is or is not obstruction. The purpose of this Note is to consider the varieties of specific acts which the courts have assimilated within the offense. In general, comparisons will be made in terms of the basic word "obstruct," and those cases arising under statutes not including the term "obstruct," or having other peculiarities which may be dispositive, will be indicated. The Note will first consider the treatments of the various courts, breaking down the activities into what appear to be convenient patterns for consideration. The Model Penal Code,[16] which was envisioned as "a treatise on the major problems of the penal law and their appropriate solutions," [17] will then be examined, and predictable results under the Code will be compared with those of the cases. Because the crimes of disorderly conduct and disturbing the peace have close connection to the general offense of obstruction in certain of its circumstances, consideration will be given these offenses when appropriate.

One basic proposition may be established before dealing with particular groups of cases. There is never need to show an actual physical assault

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[9] ARIZ. REV. STAT. ANN. § 13-541 (1956); CAL. PEN. CODE § 148; IDAHO CODE ANN. § 18-705 (1948); MINN. STAT. ANN. § 613.56 (1947); MONT. REV. CODES ANN. § 94-35-169 (1947); N.Y. PEN. LAW § 1851; N.C. GEN. STAT. § 14-223 (1953); P.R. LAWS ANN. tit. 33, § 495 (1956); UTAH CODE ANN. § 76-28-54 (1953); VIRGIN ISLANDS CODE tit. 14, § 1508 (1957).

[10] IND. ANN. STAT. § 10-1005 (1956); VA. CODE ANN. § 18-272 (1950).

[11] NEB. REV. STAT. § 28-729 (1956); OHIO REV. CODE ANN. § 2917.33 (Page Supp. 1959).

[12] COLO. REV. STAT. ANN. § 40-7-18 (1953); MICH. STAT. ANN. § 28.747 (1954).

[13] NEV. REV. STAT. § 197.090 (1955); WASH. REV. CODE § 9.18.090 (1956).

[14] Research has disclosed no case where it was held that defendant's conduct did not constitute "obstruction" but fell within the meaning of "resistance," "opposition" or some other operative word. Perhaps the fact that these statutes are viewed as a codification of the common law, see MILLER, CRIMINAL LAW § 153 (1934), explains their prevalent free-hand judicial treatment. See District of Columbia v. Little, 339 U.S. 1 (1950), where, although the ordinance in issue punished "interfering," the Court relied on cases decided under statutes providing punishment for "obstructing."

[15] Only a few of the statutes attempt to specify acts that will constitute obstruction. See, *e.g.*, NEV. REV. STAT. § 197.090 (1955) (threat, force or violence is obstruction); WIS. STAT. ANN. § 946.41 (1958) (giving false information is obstruction).

[16] MODEL PENAL CODE (Tent. Draft Nos. 6, 1957, and 8, 1958).

[17] Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1130 (1952).

upon the officer to make out the offense[18]—the statutory prohibitions encompass slighter acts than direct assault.[19] Not only does the plain meaning of the statutes indicate this result, but a number of states make specific provision for actual assaults upon an officer in addition to their general obstruction provisions, sometimes even in the same statutory section.[20] It must also be noted that there are fine distinctions drawn under the acts with regard to such questions as whether an officer is in the performance of his duties,[21] whether an arrest or service of process being resisted is lawful,[22] and whether the officer involved is of the type that the statute protects from obstruction.[23] The often complex problems created by these distinctions remain outside the scope of this Note.

THE JUDICIAL TREATMENT OF OBSTRUCTION

Verbal Conduct

(a) Intervention for Another in Difficulty With an Officer

There is some division of the cases in situations in which the defendant intervenes and speaks or acts in behalf of another involved in a dispute with an officer. As a general proposition the offense is made out where the defendant threatens the officer and apparently intends to carry out his threats by acts which could be harmful to the officer.[24] In the absence of such threats the courts are substantially agreed that no obstruction lies where the defendant complains of the propriety of the officer's actions,[25] asks informational questions of the officer,[26] or requests the officer to release

[18] Obviously an actual assault and battery is an obstruction; such cases of physical violence will not be considered in this Note. See HARRIS & WILSHIRE, *op. cit. supra* note 1, at 134.

[19] See text and notes at notes 3 and 4 *supra*.

[20] See, *e.g.*, MO. ANN. STAT. §§ 557.200, .220 (1953); PA. STAT. ANN. tit. 18, § 4314 (1945).

[21] There can be no conviction if the officer is not engaged in the performance of his duties. Bryant v. State, 16 Neb. 651, 21 N.W. 406 (1884).

[22] No conviction can arise out of resistance to an unlawful arrest. Jackson v. Superior Court, 98 Cal. App. 2d 183, 219 P.2d 879 (3d Dist. 1950).

[23] If the officer is of the type not afforded protection by the statute, there can be no conviction under it. See Herdison v. State, 166 Ark. 33, 265 S.W. 84 (1924).

[24] See, *e.g.*, Reed v. State, 103 Ark. 391, 147 S.W. 76 (1912); McBride v. State, 68 Ga. App. 755, 24 S.E.2d 135 (1943); United States v. Lowry, 26 Fed. Cas. 1008 (No. 15636) (Washington, Circuit Justice, 1808) (dictum).

[25] Raines v. State, 13 Ga. App. 693, 79 S.E. 860 (1913) (defendant refused to allow police to search brother's house without warrant); State v. Anderson, 84 Ohio App. 218, 85 N.E.2d 412 (1948) (defendant complained to desk sergeant concerning conduct of arresting officer); Levy v. Edwards, 1 Car. & P. 40, 171 Eng. Rep. 1094 (Nisi Prius 1823) (defendant told officer he had no right to handcuff boy who was arrested for fighting); *cf.* District of Columbia v. Little, 339 U.S. 1 (1950). In State v. Anderson, *supra*, the statute involved included both "obstruct" and "interfere." OHIO GEN. CODE ANN. § 6307-109 (Page 1945). The court spoke in terms of the latter word.

[26] People v. Magnes, 187 N.Y. Supp. 913 (Ct. Gen. Sess. 1921) (provided that question is propounded in a gentlemanly manner); Commonwealth *ex rel.* Walker v. Sheriff, 3 Brewst. 343 (Pa. Quarter Sess. 1869) (defendant asked for badge number so that he might report officer's cruelty); *cf.* Regina v. Green, 8 Cox Crim. Cas. 441 (Assizes 1861) (no obstruction in giving evasive answer to question).

an alleged offender.[27] In *The King v. Cook*,[28] defendant loudly criticized police action to other bystanders as unjustified. The court, although noting that defendant was known to have unfriendly feelings toward the police, affirmed that "policemen are not exempt from criticism any more than Cabinet Ministers," [29] and declined to hold defendant for obstruction.

There are, however, some decisions which do not fit the pattern indicated. In *Rex v. Goodman*,[30] a taxi was illegally stopped to allow defendant passenger to alight. When a policeman accosted the driver, defendant intervened to assert that he was to blame for the illegal stop, since the driver had merely followed his orders. The ensuing discussion grew loud and vigorous and attracted a crowd; in the confusion, as the officer moved onto the sidewalk with defendant to continue the argument, the taxi driver drove away. With only a mention of the taxi's departure during the dispute and no apparent reliance upon that fact, the court affirmed a conviction for obstruction primarily on the grounds that defendant's conduct—including loud shouting and refusal to move on when told to do so—interfered with the officer in the performance of his duties. In *Anderson v. United States*,[31] defendant challenged a policeman's legal right to give a third party a parking ticket. Defendant subsequently resisted the policeman's attempt to arrest him for "either 'disorderly' or 'interference,' " [32] and the issue presented to the court was the lawfulness of defendant's arrest. The trial court ruled as a matter of law that the arrest of defendant was legal and so charged the jury despite a dispute in the evidence over the manner of defendant's interjection—whether or not it had been orderly. And the appellate court affirmed the conviction for assault, necessarily deciding that defendant was guilty of interference in whichever manner he had conducted himself.[33] In *State v. Coy*,[34] a policeman was about to issue traffic citations for cars illegally parked across the street from defendant's theater and belonging to his patrons. Defendant protested, claiming political influence and friendship with the officer's

[27] State v. Knudsen, 27 S.D. 400, 131 N.W. 400 (1911) (defendant grasped sheriff's shoulder with his one good hand while making the request); Monse v. State, 127 Tex. Crim. 635, 78 S.W.2d 631 (1935) (*semble*); *cf.* Platt v. Greenwood, 50 Ariz. 158, 69 P.2d 1032 (1937).

[28] 11 Can. Crim. Cas. Ann. 32 (B.C. County Ct. 1906); *accord,* City of Chicago v. Brod, 141 Ill. App. 500 (1908) (defendant said of policeman's actions toward another "well, he doesn't need to shoot him"); *cf.* State v. Morrison, 46 Kan. 679, 27 Pac. 133 (1891) (dictum).

[29] 11 Can. Crim. Cas. Ann. 32, 33 (B.C. County Ct. 1906).

[30] [1951] 2 West Weekly R. (n.s.) 127 (B.C. Ct. App.) (bulk of opinion devoted to problem of whether defendant's conduct was "wilful" within the prohibition of the statute); *cf.* Bain v. The Queen, 111 Can. Crim. Cas. Ann. 281, 286 (Man. Ct. App. 1955) (concurring opinion); White v. Edmunds, Peake 123, 124, 170 Eng. Rep. 101, 102 (Nisi Prius 1791), in which Lord Kenyon remarked "when a man is in the custody of the officers of justice no other person has a right to interfere."

[31] 253 F.2d 335 (D.C. Cir. 1957).

[32] *Ibid.*

[33] See statement of Edgerton, C.J., and Bazelon, J., on denial of rehearing, Anderson v. United States, 253 F.2d 335 (D.C. Cir. 1957). For the nature of the argument see Anderson v. United States, 132 A.2d 155 (D.C. Munic. Ct. App. 1957).

[34] 40 Wash. 2d 112, 241 P.2d 205 (1952).

superiors. When the owner of one of the vehicles returned and the policeman proceeded with the issuance of the citation, defendant advised his patron to give him the ticket, saying he would take care of it. Defendant cursed the policeman; the policeman told him to leave; defendant replied that the policeman should keep his mouth shut. The officer repeated the order to leave and added a threat of arrest if defendant refused to comply. Defendant stood his ground and when the policeman informed him that he was under arrest, swung out striking the officer's arm and knocking the book of traffic tickets to the ground. He then ran for his theater, but the officer overtook him in the lobby, and a struggle ensued. When a crowd gathered, the officer left to get a warrant. One was issued under an interference statute providing that "every person who, by means of any threat, force or violence, shall attempt to deter or prevent any . . . officer from performing any duty imposed upon him by law" [35] is guilty of the offense. The reviewing court held that from the evidence a jury could find defendant guilty. Sufficient force to meet the statutory terms could be found in the act of knocking the book of tickets to the ground and the struggle in the lobby, and the jury could infer a course of conduct on the part of defendant designed to prevent the officer from carrying out his legal duty of issuing a traffic citation.

(b) Protestation in One's Own Defense

Courts which hold that one who argues or questions in another's behalf has obstructed might be expected to find the offense committed also when an individual argues or questions in his own behalf. The obstruction statutes aim to deter impediment of the efficient functioning of officials; delay and hindrance of an officer do not vary whether the objector is direct participant or intervenor. Distinction could be drawn, however, in view of the differential degrees of affirmative, self-assertive conduct involved in the two roles; there may be enough social value in protest—as a last curb upon official omnipotence—to permit it to one who is the target of official activity, while denying it to all others.[36] In any event, cases of self-protecting protestation do not appear to have arisen in those jurisdictions which have found obstruction on the part of verbal intervenors. And in other jurisdictions most courts which have been presented with the issue have refused

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[35] WASH. REV. CODE § 9.18.090 (1956).

[36] Although police freedom from the verbal attacks of third parties be deemed necessary to police effectiveness, the same freedom as regards one against whom the officer is initiating action may be viewed as too high a price—too fraught with danger of abuse—to pay for effectiveness. It is one thing to say that an individual may not accost and question a government agent, another that he must obey the agent without question. And while the protestant who argues in his own behalf remains amenable nevertheless to whatever police activity he is protesting—insofar as that activity is lawful—the intervenor, if he is not to be punished under the general obstruction statutes, is not punishable at all. The very vagueness of the statutory language may give courts an opportunity to weigh this kind of consideration in application of the acts.

on a variety of grounds to find obstruction.[37] Some courts have reasoned that argument is only indicative of an intent to obstruct,[38] or that obstruction is not made out unless there is shown to have been a fair chance of the occurrence of violence.[39] Others have summarily rejected the idea that mere discussion conducted in a peaceful fashion can be obstruction.[40] Still other courts have taken the position that profanity and dispute may be obstruction and that it is a jury question whether the words in issue did obstruct the officer;[41] if the jury believe that argument or profanity was so vociferous that the officer was dissuaded from further action because of threat of bodily harm, and if the verdict is not clearly erroneous, it will be allowed to stand.[42] Similarly, whether argument in one's own behalf is punishable either as disorderly conduct or as disturbing the peace depends on the *manner* of argument, the act of arguing being insufficient ipso facto to constitute the offenses. Mere impudence,[43] or calm argumentation [44] is not disorderly conduct. Even when mild profanity or insulting language is used, the offense is not made out unless a crowd is attracted.[45] However, if the language is more of the "fighting word" variety, such as "scum of the earth" [46] or "bastard," [47] the crime of disorderly conduct is committed. The same indefinite line between conduct which is criminal and that which is not seems to obtain where the offense charged is disturbing the peace.[48]

[37] See, *e.g.*, Wimberly v. State, 30 Ala. App. 394, 6 So. 2d 524 (1942) (operative words of statute are "oppose and resist"); Sloan v. City of Moultrie, 61 Ga. App. 885, 7 S.E.2d 760 (1940); State v. Scott, 123 La. 1085, 49 So. 715 (1909); People v. Maddaus, 5 App. Div. 2d 886, 172 N.Y.S.2d 607 (1958); Statham v. State, 41 Ga. 507 (1870) (dictum). *Cf.* McGeorge v. Commonwealth, 237 Ky. 358, 35 S.W.2d 530 (1931) (where indictment charges use of force and only abusive language is shown there is fatal variance); People v. Tinston, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (Magis. Ct. 1957) (refusal to identify self and quarreling with police over identification not disorderly conduct). *Contra,* The King v. Matheson, 41 N.B. 581, 12 D.L.R. 480 (1913); *cf.* People v. Cancel, 54 P.R.R. 26 (1938).

[38] See, *e.g.*, State v. Scott, *supra* note 37.

[39] See, *e.g.*, Statham v. State, 41 Ga. 507 (1870) (dictum).

[40] See, *e.g.*, People v. Maddaus, 5 App. Div. 2d 886, 172 N.Y.S.2d 607 (1958).

[41] State v. Scott, 123 La. 1085, 49 So. 715 (1909); State v. Estes, 185 N.C. 752, 117 S.E. 581 (1923); *accord, Ex parte* Geissler, 4 Fed. 188 (N.D. Ill. 1880) (dictum); Campf v. State, 80 Ohio St. 321, 88 N.E. 887 (1909) (dictum). Where the officer has completed performance of his duty, the question as to whether a given act might constitute obstruction does not arise, since the officer's performance of duty cannot be obstructed. Knoff v. State, 18 Okla. Crim. 36, 192 Pac. 596 (1920).

[42] See cases cited note 41 *supra.*

[43] Pinkerton v. Verberg, 78 Mich. 573, 44 N.W. 579 (1889).

[44] State v. Korich, 219 Minn. 268, 17 N.W.2d 497 (1945).

[45] Ruthenbeck v. First Criminal Court, 7 N.J. Misc. 969, 147 Atl. 625 (Sup. Ct. 1925) (defendant called officer "muttonhead"; conviction reversed); People v. Cuvelier, 8 Misc. 2d 823, 167 N.Y.S.2d 871 (Wayne County Ct. 1957) (defendant called officer "son of a bitch"; conviction reversed for lack of proof that this attracted anyone's attention); Commonwealth v. Gabrow, 97 Pa. Super. 459 (1929) (loud argument attracted crowd; conviction affirmed); Commonwealth v. Cooper, 95 Pa. Super. 382 (1928) (dictum).

[46] State v. O'Donnell, 200 Atl. 739 (N.J. Sup. Ct. 1934).

[47] City of Cleveland Heights v. Christie, 128 Ohio St. 297, 190 N.E. 770, *cert. denied,* 293 U.S. 574 (1934).

[48] See People *ex rel.* Conley v. Frank, 245 App. Div. 777, 281 N.Y. Supp. 158 (1935) (indictment charging offensive, abusive shouting held sufficient); Common-

(c) Misinformation

The courts in the few cases which have presented the problem have held that lying to police who are seeking information does not constitute obstruction.[49] However, the rationales for the decisions vary. In several cases the result was reached by reliance upon particular statutory phrasing, the courts reasoning that because such words as "forcibly" [50] or "resisting" [51] were used in conjunction with "obstruction," some physical action must be present to make out the offense.[52] In *Miller v. United States*,[53] the court reached the same result in dealing with a statute which did not contain the word "forcibly." [54] Here the federal officers to whom defendant falsely denied that a fugitive was hidden on her premises were aware that defendant was lying although, because they had no search warrant to enter her home, they could not confirm their suspicions. The court concluded that since the officers were not in fact deceived, since defendant had in any event a right to insist upon a warrant, and since the sole effect of her denials was to force the officers to procure that warrant, no conviction for obstruction could be sustained. In *People v. Cintron*,[55] defendant, asked whether a certain person was present in his place of business, untruthfully replied that she was not. Later, police returned and were able to identify the person they sought. The reviewing court reversed defendant's conviction for lack of proof of wilfulness, intimating however that if such proof were made, conviction would have been affirmed. In a somewhat related situation it has been held that declining to give one's name to police is not in itself disorderly conduct.[56] Under the general obstruction statutes, too, distinction might be made between a refusal to

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wealth v. Savko, 76 Pa. D. & C. 310 (Quarter Sess. 1951). *But cf.* Oratowski v. Civil Service Comm'n, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1954) (fact that *X* called policeman "stupid" is not an offense justifying arrest so as to vitiate charge of conduct unbecoming an officer); Scott v. Feilschmidt, 191 Iowa 347, 182 N.W. 382 (1921) (defendant's motion for directed verdict in suit for false imprisonment denied despite proof that defendant arrested plaintiff for disturbing the peace after plaintiff called him a "bastard").

[49] See cases cited notes 52-54 *infra*.

[50] 18 U.S.C. § 111 (1958) ("forcibly . . . resists, opposes, impedes, . . . or interferes").

[51] Prevention of Crimes Amendment Act, 48 & 49 Vict., c. 75, § 2 (1885), provides that "resisting or wilfully obstructing" a constable is a criminal offense.

[52] Long v. United States, 199 F.2d 717 (4th Cir. 1945); Curlett v. M'Kechnie, [1939] 1 Scots L.T. 11 (Justiciary 1938); *cf.* Regina v. Green, 8 Cox Crim. Cas. 441 (Assize 1861) (giving evasive answer to question not obstruction). *But cf. In re* Billington, 156 App. Div. 63, 141 N.Y. Supp. 16 (1913) (dictum in disbarment proceeding that giving false information to police is obstruction); Rex v. L., 51 Ont. L.R. 575, 583, 69 D.L.R. 618, 625 (1922) (dictum).

[53] 230 F.2d 486 (5th Cir. 1956).

[54] 18 U.S.C. § 1501 (1958).

[55] 66 P.R.R. 232 (1946).

[56] Leighton v. Getchell, 169 N.W. 649 (Iowa 1918); People v. Tinston, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (Magis. Ct. 1957); Commonwealth v. Chalmers, 76 Pa. D. & C. 218 (Quarter Sess. 1950); Myers v. Collett, 1 Utah 2d 406, 268 P.2d 432 (1954) (dictum).

aid police and an affirmative deception that sends them astray.[57] It should be noted that several states have specifically provided by statute that knowingly giving false information to the police with intent to mislead is obstructing an officer.[58]

(d) Counseling a Third Person to Resist

In addition to his possible criminal liability as an accomplice[59] or for the offense of soliciting to crime,[60] one who counsels or advises another to resist or to obstruct the police may in some circumstances be punishable under the general obstruction statutes.[61] Cases are rare. In *State v. Caldwell*,[62] defendant advised one Moore to draw a line on the ground, asserting that if the sheriff tried to cross the line to serve process, Moore would be within his legal rights if he defended himself, even to the extent of killing the sheriff. Moore drew the line and when the sheriff crossed it, struck him with a stake. The court upheld defendant's conviction under a general obstruction statute, saying by way of reply to an argument that merely advising another did not make out the offense, that defendant's actions amounted to more than advice. The court pointed to defendant's

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[57] Compare the reasoning in United States v. Philippe, 173 F. Supp. 582 (S.D.N.Y. 1959) (false claims statute).

[58] NEB. REV. STAT. § 28-729 (1943); WASH. REV. CODE § 9.69.060 (1951); WIS. STAT. ANN. § 946.41 (1958).

[59] Common-law liability as a principal in the second degree must be predicated upon finding (1) a guilty principal in the first degree, (2) that the person sought to be convicted as a principal in the second degree was actually or constructively present when the offense was committed, and (3) that he aided or abetted the commission of the offense. CLARK & MARSHALL, CRIMES § 8.02, at 449 (6th ed. 1958). It has been said that every person present at the commission of a crime who encourages it or incites it in any way is assumed by the law to be an aider or abettor. 1 BURDICK, CRIME § 221 (1946). Common-law liability as an accessory before the fact (liability *as an accessory*, technically, is limited at common law to participation in felonies; all participants in misdemeanors are punishable, if at all, as principals) need not be predicated upon presence at the commission of the offense: the accessory is liable as such if he procures, counsels or commands another to commit it. *Id.* § 223, at 298, § 219, at 293. Some statutes abolish the distinctions among principals of the first and second degrees and accessories before the fact. See, *e.g.*, 18 U.S.C. §§ 2, 3 (1958). Others retain it in form but provide for equality of punishment. For thorough discussion see *id.* at § 227.

[60] "Solicitation is a distinct common-law misdemeanor in which the act forbidden consists of the accused person's parol or written efforts to activate another to commit a criminal offense." CLARK & MARSHALL, *op. cit. supra* note 59, § 4.02, at 194. "The act solicited need not be committed to allow a punishment for solicitation." *Id.* at 197. Thus, if the resistance or obstruction counseled were a crime, counseling might amount to solicitation. However, while it is undoubted that solicitation to commit a *felony* is a crime, amenability to punishment at common law of solicitation to commit a misdemeanor is disputed. "Some cases have held that no misdemeanors should be included . . . but the general rule is that it is a crime to solicit one to commit a misdemeanor provided it is of such a character that it affects the public peace and justice." 1 BURDICK, *op. cit. supra* note 59, § 104, at 116. See generally, Curran, *Solicitation: A Substantive Crime*, 17 MINN. L. REV. 499 (1933); Note, *Solicitations*, 41 DICK. L. REV. 225 (1937). Note that inasmuch as solicitation is a common-law crime, in jurisdictions where all crimes are statutory, only those solicitations expressly enumerated by statute are culpable. 1 BURDICK, *op. cit. supra* note 59, at § 107.

[61] Wis. Stat. § 346.39 (1953), since repealed, specifically prohibited this activity.

[62] 2 Tyler 212 (Vt. 1802).

"direction" that Moore draw a line and to defendant's own cautioning of the sheriff not to pass, and concluded that "if the Jury considered that the defendant's conduct impeded or hindered the officer in the execution of his office, they must find him guilty." [63] Thus, at least where the advisor is present on the immediate scene of the altercation, where he advises physical aggression, and where that aggression is actualized, he is guilty of obstruction. To what extent the act of advising will be punishable in the absence of one or another of these three elements remains questionable. Language in a case sustaining the conviction of a labor organizer for encouraging pickets to charge a police cordon asserts that one who advises another to resist an officer is criminally responsible even though that other refuses to follow the advice.[64] But this decision was under a statute particularly punishing counsel or advice to obstruct as well as obstruction.[65] Another case finds violation where defendant urged third persons only to refuse to give their names to policemen during the course of a raid; but here the advice was couched in terms abusive of the officers.[66] No case has been discovered penalizing the giving of advice where the advisor was not immediately involved in the conflict situation.

(e) Warning Others of the Presence of Police

A line of English decisions illustrates the complexities of applying the illusive obstruction doctrine to fact situations in which defendant, by alerting third persons that law enforcement officials are nearby, causes those persons to alter their behavior in a way which makes more difficult the officials' performance of their duty. In *Bastable v. Little*,[67] defendant posted himself near a device maintained by the police for measuring the speed of passing vehicles and signalled approaching motorists that police were ahead. Quite naturally, the motorists slowed down. A conviction for obstructing was reversed in the absence of proof that the motorists had been previously speeding, Alverstone, C.J., maintaining that lacking such proof no duty of the constables had been affected, and Darling, J., agreeing and drawing a distinction between warning to prevent the commission of a crime and warning to avoid apprehension after the crime has been committed. In *Betts v. Stevens*,[68] substantially the same court upheld the conviction where it was shown that the cars were in fact speeding prior to

[63] *Id.* at 215.

[64] Teske v. State, 256 Wis. 440, 446, 41 N.W.2d 642, 645 (1950). Defendant advisor was convicted of counseling resistance, while his codefendant advisees were acquitted of resisting. The codefendants were convicted of disorderly conduct, however, and the court viewed their acquittal on the resistance charge as a jury compromise: clearly they had in fact followed defendant's advice. The rule that advising is culpable despite its rejection by the advisee is at best an alternative holding: the court more heavily relies on the rule that logical inconsistency in criminal verdicts is not fatal.

[65] See note 61 *supra*.

[66] Rex v. L., 51 Ont. L.R. 575, 69 D.L.R. 618 (Sup. Ct. 1922).

[67] [1907] 1 K.B. 59 (1906).

[68] [1910] 1 K.B. 1 (1909).

defendant's warning.[69] *Hinchcliffe v. Sheldon*[70] involved the son of an innkeeper who, returning home after the legal hours for sale of intoxicants and observing police watching at the windows, knocked on the door and shouted a warning to those inside. The police immediately closed on the house, but by the time they could secure entrance eight minutes later, they found only a well populated room and a wet bar counter: no licensing offense could be proved. The court, however, affirmed the son's conviction for obstruction, distinguishing *Bastable v. Little* on the basis that the Licensing Act gave the police special authorization to enter licensed premises at any time, and that this authorization imposed a duty on officers to enter whenever they were suspicious of infractions—a duty whose performance the son's act delayed. Whether or not this distinction is tenable —whether the British police indeed have a duty to investigate *possible* violations of the liquor laws but a corresponding duty only to enforce *actual* violations as regards the traffic laws—the approach of the English courts is illuminating. Apparently feeling the need to qualify the over-broad concept of obstruction (which, in its unlimited statutory expanse, not only would threaten with criminal penalty virtually every individual contact with government officers, but also would permit such absurd results as conviction of persons who, by preventing the incidence of crime, prevent also the incidence of crime enforcement) the courts have resorted to viewing the policeman's activity as a complex of separate, discontinuous, specific duties. A warning which will impede the performance of one of these particular duties is punishable as an obstruction.[71]

Physical Acts

While a number of jurisdictions make specific provision for the separate crime of resisting arrest,[72] activity punishable as resistance will usually also fall within the terms of the general obstruction statutes,[73] inasmuch as arrest is made under warrant—an instrument of process—or otherwise within the scope of duty of the arresting officer. Though courts do tend to speak in distinct terms of "resisting arrest" and "obstructing justice," they appear to accord scant attention to the wording of the particular enactment applicable[74] and to treat both concepts flexibly as common-law crimes.

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[69] Lord Alverstone, C.J., and Darling, J., followed their prior opinions. Bucknill, J., concurred in both opinions.

[70] [1955] 3 All E.R. 406 (Q.B.).

[71] Apparently no American court has considered an instance of warning under the general obstruction statutes or upon prosecution for disorderly conduct or disturbing the peace.

[72] See, *e.g.*, ALASKA COMP. LAWS ANN. § 65-7-18a (Supp. 1958); IND. ANN. STAT. § 10-1005 (1956).

[73] For examples of prosecutions for resisting arrest under general obstruction statutes see, *e.g.*, State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Beckendorf, 79 Utah 360, 10 P.2d 1073 (1932).

[74] See cases cited note 73 *supra*. See also 2 ALEXANDER, ARREST § 596 (1949).

(a) Minor Scuffling and Flight

Present case law restricts the non-punishable use of force in any form —even such merely technical batteries as brushing aside an advancing officer or breaking away from his grip—to those situations in which the attempted arrest or service of process is illegal.[75] So long as the officer is acting with lawful authority, a slight pushing can constitute obstruction.[76] Similarly, knocking the papers from the hands of a serving officer has been found to be resistance within the meaning of the pertinent statute.[77] By contrast, if even in some such merely technical respect as defective process the actions of the officer are outside the scope of his duties, threats or actual assault and battery are not punishable.[78] Some statutes specifically punish all violent physical conflicts as disorderly conduct,[79] while most of the other disorderly conduct legislation is broad enough to cover such activity:[80] the disorderly charge has in fact been used to punish minor affrays.[81] It is apparent that nearly any scuffle, if in a public place, can be found a disturbance of the peace.[82]

The flight cases are those in which defendant has foiled arrest, service of process, or some other official action by making off when the officer attempted to perform his duty; the courts have divided on the question of whether such conduct is obstruction. In *Carter v. United States*,[83] where an officer was following up a lead concerned with the conduct of lotteries, defendant started his car away with the officer half in and half out of it. The car eventually attained a speed of sixty miles per hour with the officer clinging to the back of the front seat and the vent shield. The court affirmed a conviction for forcible obstruction. Similarly, flights in which defendants endangered pursuing officers by smoke screen[84] or by swerving the fleeing automobile from side to side[85] have been held to constitute

[75] See, *e.g.*, People v. Craig, 152 Cal. 42, 91 Pac. 997 (1907).

[76] State v. Best, 91 W. Va. 559, 113 S.E. 919 (1922); *cf.* Granado v. State, 161 Tex. Crim. 128, 275 S.W.2d 680 (1955).

[77] King v. State, 89 Ala. 43, 8 So. 120 (1890); *cf.* State v. Merrill, 52 S.D. 129, 216 N.W. 874 (1927).

[78] People v. Manriquez, 138 Cal. App. 614, 33 P.2d 36 (4th Dist. 1934); Pettis v. State, 209 Miss. 726, 48 So. 2d 355 (1950); Bryant v. State, 16 Neb. 651, 21 N.W. 406 (1884); *cf.* Moses v. State, 6 Ga. App. 251, 64 S.E. 699 (1909). The rule is stated that once "it is held that the officer is not engaged in the lawful discharge of his duties . . . the defendant is consequently justified in interfering." MILLER, CRIMINAL LAW § 153, at 462 (1934).

[79] See, *e.g.*, DEL. CODE ANN. tit. 11, § 471 (1953); MINN. STAT. ANN. § 615.17 (1958).

[80] See, *e.g.*, IDAHO CODE ANN. § 18-6409 (1947); IOWA CODE ANN. § 744.1 (1950).

[81] See, *e.g.*, McKee v. State, 75 Okla. Crim. 390, 132 P.2d 173 (1942).

[82] See MILLER, CRIMINAL LAW § 165 (1934).

[83] 231 F.2d 232 (5th Cir.), *cert. denied*, 351 U.S. 984 (1956). *Cf.* The King v. Griffin, 9 Mar. Prov. 84, [1935] 2 D.L.R. 503 (N.B.) (defendant brushed officer off running board by driving close to corner of house).

[84] Lewin v. United States, 62 F.2d 619 (1st Cir. 1933). The court said in dictum that if the smoke screen had served merely to obscure the flight no offense would have been proven.

[85] Hogg v. United States, 35 F.2d 954 (5th Cir. 1929).

obstruction. According to a few courts merely driving off or refusing to stop is also an offense.[86] On the other hand, in *Jones v. Commonwealth*,[87] defendant was riding in a car containing barley, hops, yeast and sugar when special liquor control agents gave chase. Defendant's driver set off at high speed and in mid-flight defendant threw a bag of barley out the window into the highway so that the following officers were forced to swerve to avoid hitting it. The appellate court reversed a conviction for obstruction on grounds that avoidance is not obstruction, that the barley bag created no grave danger to the officers, and that the evidence raised at least a reasonable doubt that the bag was thrown to avoid being caught with it rather than to prevent the officers from following. Apparently no court has yet considered whether instances of flight are punishable as disorderly conduct or breach of the peace. Both concepts, however, have been defined widely enough to include at least such flights as by their manner are capable of causing public alarm or disquietude.[88]

(b) Blocking Access by an Officer

Cases in which public officers, seeking entrance to or exit from premises in attempts to arrest or to search or inspect, have been impeded by physical obstacles interposed by defendant are variously treated by the courts. In *District of Columbia v. Little*,[89] a health inpector sought to enter defendant's premises without a warrant. Defendant refused to unlock the door, claiming that his entry would violate her constitutional rights. She neither used nor threatened force of any kind.[90] The Supreme

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[86] Under REV. STAT. § 3068 (1875), as amended, 49 Stat. 528 (1935), 19 U.S.C. § 70 (1958), providing for penalty if a master "shall obstruct or hinder" revenue officers attempting to board a boat, refusal to stop has been held an obstruction. The Gander, 54 F.2d 505 (2d Cir. 1931); The Barracouta, 42 Fed. 160 (E.D.N.Y. 1890); *cf.* The Dolphin, 291 Fed. 380 (S.D. Fla. 1923); People v. Hill, 131 Misc. 521, 227 N.Y. Supp. 285 (Lewis County Ct. 1928). *But cf.* State v. Le Blanc, 115 Me. 142, 98 Atl. 119 (1916) (dictum). Similarly, it has been held that driving off with an automobile about to be searched by authority of a valid search warrant is "obstruction." Brown v. Commonwealth, 263 S.W.2d 238 (Ky. 1954). Several Canadian cases hold that refusal to stop is obstruction under CAN. CRIM. CODE § 167 (1927), which provides that whoever "resists or wilfully obstructs any public officer" shall be punished. The King v. D'Entremont, 4 Mar. Prov. 142, [1932] 2 D.L.R. 236 (N.S. 1931); Rex v. Gallant, [1929] 1 D.L.R. 671 (P. Edw. I.).

[87] 141 Va. 471, 126 S.E. 74 (1925). *Cf.* Commonwealth v. Anderson, 239 Ky. 58, 40 S.W.2d 265 (1931), where the court held that swerving an automobile from side to side in order to prevent capture was not "obstruction." However, the context of the case—a prosecution for murder in which defendant policeman, who killed a fugitive, attempted justification on grounds that the fugitive was committing the felony of obstructing—weakens the force of this holding.

[88] See, *e.g.*, State v. Van Allen, 140 Conn. 586, 102 A.2d 526 (1954) (to constitute disturbing the peace it is sufficient that act naturally causes serious disquietude on the part of those in the vicinity); State v. Reynolds, 243 Minn. 196, 66 N.W.2d 886 (1954) (to constitute disorderly conduct it is sufficient that act affects the peace and quiet of those who witness it, or disturbs or provokes them to resentment). It has been said that breach of the peace and disturbing the peace are substantially synonymous. See People v. Anderson, 117 Cal. App. 763, 1 P.2d 64 (App. Dep't Super. Ct. 1931).

[89] 339 U.S. 1 (1950).

[90] *Id.* at 5.

Court avoided decision of the complex fourth and fifth amendment problems involved [91] by interpreting the ordinance, which penalized "interfering with or preventing any inspection," [92] as neither imposing on homeowners a duty to assist health inspectors nor encompassing an owner's failure to unlock her door, accompanied by remonstrations based on "substantial" constitutional grounds. Reversal of conviction was affirmed.[93]

Some courts have suggested that if defendant refuses to unlock an already locked door there is no obstruction, but that if he locks or closes an open door, he is punishable.[94] However, this distinction, based upon an interpretation of "obstruct" as requiring a positive act,[95] is not widely utilized: a number of courts have reached similar results without invoking it; [96] other courts reach opposite results without refuting it.[97] In the distinguishable class of cases in which defendant, by straddling the doorway, has prevented police from entering or from leaving, most courts have found the offense of obstruction.[98] These same types of activity do not per se amount to disorderly conduct or disturbing the peace, but the manner in which they are done may make out the crime.[99]

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[91] See Frank v. Maryland, 359 U.S. 360 (1959), 108 U. PA. L. REV. 265 (1959).

[92] Washington, D.C., Commissioners' Regulations Concerning the Use and Occupancy of Buildings and Grounds § 12, April 22, 1897, as amended, July 28, 1922.

[93] People v. Maddaus, 5 App. Div. 2d 886, 172 N.Y.S.2d 607 (1958), relied on *Little* to reach a similar result under a similar statute. *But see* United States v. McDonald, 26 Fed. Cas. 1074 (No. 15667) (E.D. Wis. 1879) (jury charge that refusing to open door is obstruction); Blossom Infants' Wear Corp. v. Soltoff, 46 Pa. D. & C. 11 (Magis. Ct. 1942) (dictum). See People v. Conese, 40 N.Y. Crim. 457, 203 N.Y. Supp. 596 (Ct. Spec. Sess. 1923), where it was held not to be disorderly conduct to ask a policeman to leave when the policeman could present no authority for being on defendant's premises.

[94] See, *e.g.*, Vince v. State, 113 Ga. 1070, 39 S.E. 435 (1901); Regina v. Semeniuk, 14 West. Weekly R. (n.s.) 523 (Alberta Dist. Ct. 1955).

[95] See cases cited note 94 *supra.*

[96] See, *e.g.*, State v. Merryfield, 180 Kan. 267, 303 P.2d 155 (1956) (going into house and locking the door held obstruction); The King v. Munn, 13 Mar. Prov. 247, 253 [1938] 4 D.L.R. 504, 510 (P. Edw. I.) (dictum) (refusal to unlock door not obstruction); *cf.* People v. Dow, 117 Mich. 573, 76 N.W. 89 (1898) (telling inspector to use another door not obstruction).

[97] See, *e.g.*, Commonwealth v. Rhone, 174 Pa. Super. 166, 100 A.2d 147 (1953) (refusal to open trunk of car held obstruction); Commonwealth v. Farling, 12 Pa. Dist. 732 (Quarter Sess. 1903) (closing and hooking screen door not obstruction). These cases are perhaps distinguishable: in the latter, where the home was involved, the court relied upon the concept of a man's home as his personal domain.

[98] See, *e.g.*, Drifoos v. City of Jonesboro, 107 Ark. 99, 154 S.W. 196 (1913); People *ex rel.* Fried v. Frank, 73 Misc. 1, 130 N.Y. Supp. 807 (Spec. Term 1911); City of Clovis v. Archie, 60 N.M. 239, 290 P.2d 1075 (1955); Appling v. State, 95 Ark. 185, 128 S.W. 866 (1910) (dictum). *But cf.* Hutchinson v. State, 9 Ga. App. 62, 70 S.E. 352 (1911).

[99] *Compare* City of Chicago v. Holmes, 339 Ill. App. 146, 88 N.E.2d 744 (1949) (locking door to prevent entry by others held not disorderly conduct), *with* Whitten v. Mayor & Aldermen, 26 Ga. App. 377, 106 S.E. 302 (1921) (slamming door in face of police while cursing held disorderly conduct), *and* People v. Hipple, 263 N.Y. 242, 188 N.E. 725 (1934) (blocking public doorway by refusing to move on held disorderly conduct). The last result may have been compelled by N.Y. PEN. LAW § 722(2), which punishes anyone who "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

(c) Refusal to Follow an Officer's Order

Where a police officer orders a person or a group to move on or to disperse, most courts hold that failure to comply is obstruction or resistance.[100] One court, sustaining conviction under an "interference" ordinance where defendant had been slow in moving off, has said that "such interference occurs if what defendant did was calculated in any appreciable degree to hamper or impede the police in the performance of their duties as they saw them."[101] Typically opinions treating fact situations of these types offer no such statement of broad guiding principle, but rather conclude without analysis that the conduct is punishable. Courts which have been faced with the problem indicate a split as to whether behavior of this type is punishable either as disorderly conduct[102] or as breach of the peace.[103]

No consistent pattern is revealed by the cases in which the official's order is one other than to move on or to disperse. One court has held that

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[100] See Commonwealth v. Baltzley, 11 Pa. D. & C. 2d 235 (Quarter Sess. 1957) (refusal to break up human chain); Despard v. Wilcox, 102 L.T.R. (n.s.) 103 (K.B. 1910) (refusal to leave street in front of Prime Minister's residence); Pankhurst v. Jarvis, 101 L.T.R. (n.s.) 946 (K.B. 1909) (refusal to leave street in front of Parliament); Rex v. Johanson, [1947] 2 D.L.R. 458 (B.C. Ct. App. 1946), *rev'd on other grounds*, [1947] 4 D.L.R. 337 (Can. Sup. Ct.) (refusal to move on); Rex v. Golden, 51 B.C. 236, [1937] 1 D.L.R. 350 (Ct. App. 1936) (refusal to stop selling flowers and move on when told to do so by officer); The King v. Leclaire, 12 Can. Crim. Cas. Ann. 332 (Que. K.B. 1906) (refusal to move from cab stand); People v. Southern, 274 Mich. 628, 265 N.W. 759 (1936) (alternative holding). *Compare* People v. Lo Vecchio, 185 Misc. 197, 56 N.Y.S.2d 354 (Utica City Ct. 1945) (refusal to move on not disorderly conduct); Imason v. Cope, 5 Car. & P. 193, 172 Eng. Rep. 936 (Nisi Prius 1831). This last case cited was an action for assault and battery against a policeman who argued that his use of force was necessary inasmuch as plaintiff had refused to move back. The court directed a verdict for plaintiff, saying that no blow should have been struck.

[101] State v. Taylor, 38 N.J. Super. 6, 30, 118 A.2d 36, 48 (App. Div. 1955). The ordinance involved provides that those who "in any manner interfere with . . . any member of the police force . . . in the lawful discharge of his duty" shall be punished. REV. ORDINANCES OF NEWARK § 20.24 (1951).

[102] Some cases hold such refusal not disorderly conduct. People v. Swald, 190 Misc. 239, 73 N.Y.S.2d 399 (Utica City Ct. 1947); People v. Dale, 47 N.Y.S.2d 702 (Utica City Ct. 1944); People v. De Stefanis, 34 N.Y.S.2d 52 (Utica City Ct. 1942); *cf.* City of Chicago v. Corney, 13 Ill. App. 2d 396, 142 N.E.2d 160 (1957); People v. Gilinsky, 203 Misc. 46, 113 N.Y.S.2d 861 (Broome County Ct. 1952); Taylor v. Commonwealth, 187 Va. 214, 46 S.E.2d 384 (1948). Others, which may be explained on a theory of incipient riot, hold that refusal to disperse is disorderly conduct. Bennett v. City of Dalton, 69 Ga. App. 438, 25 S.E.2d 726, *cert. denied*, 69 Ga. App. 903, *appeal dismissed*, 320 U.S. 712 (1943); State v. Davis, 197 Minn. 381, 267 N.W. 210 (1936). N.Y. PEN. LAW § 722(3), specifically provides that there shall be punished for disorderly conduct anyone who "congregates with others on a public street and refuses to move on when ordered by the police." Since "congregates" has been interpreted as requiring at least three persons, see People v. Carcel, 3 N.Y.2d 327, 144 N.E.2d 81 (1957), the New York cases previously cited are not affected by this statute.

[103] It has been held that refusal to move on is not disturbing the peace. State v. Small, 184 Iowa 882, 169 N.W. 116 (1918); *cf.* Flores v. City of Denver, 122 Colo. 71, 220 P.2d 373 (1950). However, there is language to the contrary, at least where a large number of people are involved. See Commonwealth v. Sherman, 14 Pa. D. & C. 4, 14 (Quarter Sess. 1930) (dictum).

refusal to get off a bed to allow officers to search it constitutes resistance;[104] in arriving at its conclusion this court relied upon a case involving actual assault and battery in which it had been stated that, to prevent occasion for violence, one who stands in the way of police officers should be found guilty of obstruction.[105] In *Bathke v. Myklebust*,[106] a former employee at a state school for the deaf, having been informed of his dismissal, refused to return to his superior officer keys given him incident to his employment. In an action for false imprisonment brought against the superior by the employee, a verdict for defendant superior was affirmed on the rationale that the employee's keeping of the keys and thus preventing the superior from effectively discharging his duties constituted an obstruction and justified the imprisonment. Such varied actions as refusing to drive a suspectedly overweight truck onto a scale,[107] crossing a national guard picket line,[108] and declining to answer a question on the witness stand[109] have also been ruled obstructive. By contrast, one court has held that a refusal to take manual possession of process as directed by an officer is not "resisting or opposing."[110] Similarly, refusal to come when called by a policeman was held not to constitute obstruction;[111] nor was refusal to produce colts, which a sheriff was seeking to attach, resistance.[112] The cases display the same inconsistency where disorderly conduct or disturbing the peace is the crime charged.[113]

(d) Destroying or Tampering With Evidence

Where defendant has destroyed or altered an article or substance which might have been used as evidence against him, the courts agree that he has obstructed the officer who was attempting to take possession

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[104] Speck v. State, 34 Ala. App. 325, 41 So. 2d 198, *cert. denied*, 252 Ala. 513, 41 So. 2d 200 (1949); *cf.* Cooksey v. State, 84 Ark. 485, 106 S.W. 674 (1907); United States v. Lukens, 26 Fed. Cas. 1011 (No. 15639) (D. Pa. 1818) (dictum).

[105] Appling v. State, 95 Ark. 185, 128 S.W. 866 (1910).

[106] 69 S.D. 534, 12 N.W.2d 550 (1943).

[107] People v. Fidler, 280 App. Div. 698, 117 N.Y.S.2d 313 (1952) (dictum that jury could so find).

[108] *In re* Smith, 14 Ohio N.P. (n.s.) 497, 23 Ohio Dec. 667 (C.P. 1913).

[109] Commonwealth v. Hargreaves, 50 Pa. D. & C. 641 (Quarter Sess. 1944) (refusal to answer a question before a magistrate). The case is perhaps explainable on the ground that under Albright v. Lapp, 26 Pa. 99 (1856), magistrates have no power to punish for contempt.

[110] Caldwell v. State, 32 Ala. App. 228, 23 So. 2d 876 (1945).

[111] City of Monroe v. Ducas, 203 La. 974, 14 So. 2d 781 (1943).

[112] State v. Welch, 37 Wis. 196 (1875). The relevant statute included only the word "resist." It now reads "resists or obstructs." WIS. STAT. ANN. § 946.41 (1958).

[113] See State v. Sanford, 203 La. 961, 14 So. 2d 778 (1943) (passing out leaflets after being told not to do so by police held not disturbing the peace); People v. Heinlein, 172 N.Y. Supp. 669 (Westchester County Ct. 1918) (refusal to ring church bells after being ordered to do so by mayor held not disturbing the peace).

of that evidence.[114] Thus, in *Johnson v. State ex rel. Maxey*,[115] where defendant placed a foreign substance in a container of fruit juice which had been collected for testing and examination, making impossible any subsequent analysis of the juice, defendant's arrest for obstructing was sustained against an attack by habeas corpus. Likewise, where defendant broke loaves of bread which an inspector was about to check for short weight, the court affirmed a conviction for obstruction.[116]

(e) Removing, Refusing To Point Out, or Hiding Property or Persons Subject to Process

In *Crumpton v. Newman*,[117] plaintiff in an action for false imprisonment refused to point out to the attaching officer a wagon load of goods belonging to another. The court, in holding that there was no legal justification for his imprisonment, ruled that active opposition was necessary to constitute an offense of obstruction and failed to find such opposition in plaintiff's refusal. However, where intent to conceal a person sought by the police can be shown, the act of removing such a person from the reach of law enforcement officers will make out the offense.[118] Some courts have recognized a distinction between acts affecting the object of process and acts affecting the serving officer, deeming only the latter obstruction.[119] To these courts, removing or hiding property subject to judicial levy is obstruction only of the object of process, not of the officer.[120] Other courts have refused to allow this distinction and have held either

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[114] See, *e.g.*, Johnson v. State *ex rel.* Maxey, 99 Fla. 1311, 128 So. 853 (1930); People v. Lanza, 55 P.R.R. 208 (1939); State v. Sandman, 4 Utah 2d 69, 286 P.2d 1060 (1955). The only Canadian Case discovered is in accord. Rex v. Schultz, [1945] 1 West. Weekly R. 493 (Sask. Police Ct.). It should be noted that those courts which adopt the view that the essence of the offense is resisting the officer, not the process or duty he is attempting to carry out, see notes 119-20 *infra* and accompanying text, could not reach this result. See, *e.g.*, Knoff v. State, 18 Okla. Crim. 36, 192 Pac. 596 (1920); State v. Welch, 37 Wis. 196 (1875).

[115] 99 Fla. 1311, 128 So. 853 (1930).

[116] People v. Lanza, 55 P.R.R. 208 (1939).

[117] 12 Ala. 199 (1847). MISS. CODE ANN. § 2295 (1956), specifically provides that refusing to point out property subject to process is a crime. For a case illustrating the difficulty of proving the offense see Cantwell v. State, 117 Miss. 152, 77 So. 960 (1918).

[118] People v. Maas, 133 Cal. App. 135, 23 P.2d 796 (4th Dist. 1933); Hargis v. Commonwealth, 284 Ky. 174, 144 S.W.2d 214 (1940); *cf.* Brown v. Commonwealth, 263 S.W.2d 238 (Ky. 1953). In the first two cases it was held that there was insufficient proof of intent.

[119] See, *e.g.*, State v. Welch, 37 Wis. 196 (1875) (statute included only the word "resist").

[120] Warren v. State, 179 Ark. 725, 17 S.W.2d 866 (1929); Davis v. State, 76 Ga. 721 (1886); Knoff v. State, 18 Okla. Crim. 36, 192 Pac. 596 (1920); Farris v. State, 82 Tenn. 295 (1884). See also State v. Sotherlen, 16 S.C. Law. 414 (1824), which reaches the same result by calling a rescue of levied goods a private wrong to the attaching official.

type of conduct criminal.[121] In *Campf v. State*,[122] a court declining to make the distinction attempts to line up the cases in terms of the statutory split between jurisdictions which penalize only obstruction of officers serving process and those which penalize obstruction of officers in the performance of any of their duties. While it might be argued that nothing inherent in the difference between the two general types of obstruction statutes—which appear to delimit the class of official who may not be obstructed, not to describe in what manner any given official may be deemed to have suffered obstruction—compels recognition of this distinction, it is indeed more plausible to read the process-server statutes, which aim more specifically at the problem of judicial levy, as intended to cope with all activity obstructive of official function in that area. Finally, it should be noted that several states have by statute specifically made it a criminal act to remove goods sought to be levied upon.[123]

THE MODEL PENAL CODE

The Model Penal Code treats the range of situations which arise under the traditional obstruction statutes in two main sections. Three other sections may be applicable to specific cases now punishable as obstruction.[124] Section 208.30, entitled "Obstructing Administration of Law or Other Governmental Function," provides:

> "A person commits a misdemeanor if he purposely obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section shall not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions." [125]

This section is described in the comment as a "general supplement" to the more specific sections treating various interferences with the proper operation of the government.[126] The comments make clear that the physical interference envisaged need not be violent: tampering with the motor of an official's car to prevent him from moving about to attend to his duties

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121 See, *e.g.*, Campf v. State, 80 Ohio St. 321, 88 N.E. 887 (1909); State v. Johnson, 134 W. Va. 357, 59 S.E.2d 485 (1950). See State v. Morrison, 46 Kan. 679, 689, 27 Pac. 133, 137 (1891), where a jury charge that included a statement that hiding levied-upon property so that it could not be sold would be obstruction within the meaning of the pertinent statute was held not reversible error.

122 80 Ohio St. 321, 88 N.E. 887 (1909).

123 IDAHO CODE ANN. § 18-708 (1947); MISS. CODE ANN. § 2296 (1956).

124 The main sections are MODEL PENAL CODE §§ 208.30, 208.31 (Tent. Draft No. 8, 1958). The others are MODEL PENAL CODE §§ 208.22 (Tent. Draft No. 6, 1957), 208.25, 208.26 (Tent. Draft No. 8, 1958).

125 MODEL PENAL CODE § 208.30 (Tent. Draft No. 8, 1958).

126 MODEL PENAL CODE § 208.30, comment 1 (Tent. Draft No. 8, 1958).

suffices.[127] But mere disputation of the officer's authority, or other verbal challenge or comment offered without physical interference, would seem to be immune from liability, except in those extreme situations where argument reaches the level of threat of battery or invitation to mob violence.[128] The section clearly encompasses cases of blocking access (closing a door in front of police or straddling the doorway), cases of actively concealing or removing persons or property, and those cases of refusal to obey orders which involve remaining physically in an officer's way. Query whether it covers in addition such warnings or advisings of third persons as cause those persons physically to interfere with the officer; also whether it covers refusing to open a previously closed door. The latter instance, especially, appears excluded by the avoiding-compliance exception.

Section 208.31, "Resisting Arrest or Other Law Enforcement," provides:

> "A person commits a misdemeanor if, for the purpose of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily harm to the officer or others, or employs means justifying or requiring substantial force to overcome the resistance." [129]

Thus, by defining the crime not in terms of any behavioral construct—whether "obstruction" or some more precise enumeration of specific acts—which is required to create the requisite risk, but in terms of the creation of risk itself, the section shifts the focus of inquiry from the nature of the act to its effect. Conduct of any sort, whether or not currently punishable under the general obstruction statutes, whether verbal or physical, affirmative or negative, comes within the reach of the Code as soon as it can be shown to have created a substantial risk of bodily harm. Cases of warning and advising, then, are culpable subject to the critical qualification of risk-creation; similarly, instances of flight, specifically exempted from section 208.30, are reached by section 208.31, subject to the same qualification. Instances of minor scuffling may be amenable to penalty even though they create no substantial risk of bodily harm: alternatively, they are criminal if "justifying or requiring substantial force to overcome." Whether those instances of warning or advising which cause a third person to oppose police, and whether wholly negative acts such as refusal to open an already locked door, may not also be criminal under the second clause of 208.31, without requirement of meeting the risk-creation qualification, may

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127 MODEL PENAL CODE § 208.30, comment 2 (Tent. Draft No. 8, 1958).

128 Such invitation to mob action in a potential riot situation is presently a crime. See, *e.g.*, In the Matter of Stanridge, 23 Cal. App. 2d 95, 72 P.2d 162 (3d Dist. 1937); People v. King, 236 Mich. 405, 210 N.W. 235 (1926); Commonwealth v. Frankenfeld, 114 Pa. Super. 262, 173 Atl. 834 (1934); *cf.* Armstrong v. Vicksburg, S. & P.R.R., 46 La. Ann. 1448, 16 So. 468 (1894). See also Pierce v. State, 17 Tex. Crim. 232 (1884) (defendant stood by with gun in holster while brother argued with officer). See also MODEL PENAL CODE § 208.31 (Tent. Draft No. 8, 1958).

129 MODEL PENAL CODE § 208.31 (Tent. Draft No. 8, 1958).

depend upon whether such verbal action or entire non-action constitutes an "employment of means" within the section.

A reading of section 208.22 indicates that lying to or misinforming a public officer, so long as the false communication is oral, is not an offense under the Code. That section, which defines the crime of unsworn falsification to authorities, is limited to "any written false statement" [130] and, as the comment explains, impliedly excludes oral misstatements.[131] Another particular variety of obstructive behavior is singled out for specific treatment, within specific limitation, in section 208.25, which makes responsible one who,

> "believing that an official proceeding or investigation is pending or contemplated . . . attempts to induce or otherwise cause a witness or informant to:
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> . . . .
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> (c) elude legal process summoning the person to testify; or
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> (d) absent himself from any proceeding or investigation to which he has been legally summoned." [132]

And, similarly, section 208.26 separately establishes the offense of tampering with physical evidence,[133] subject to the limitation that the tampering party believe that "an official proceeding or investigation is pending or about to be instituted." [134] Such belief in the pendency or imminence of proceedings remains an element in the criminality of the destruction of evidence only until such time as a public officer attempts to reduce the evidence to possession, however; once the officer appears on the scene, destruction would be punishable under 208.30. The overlapping of the sections in this dimension, section 208.30 relaxing the more stringent scienter requirement of section 208.26 insofar as the former is applicable, is consonant with the different purposes of the two provisions: 208.26 aims primarily at the protection of the judicial function; 208.30 attempts, *inter alia*, to reduce occasions of possible violence by deterring interference with the officer in the field.

Punishment of Verbal Conduct Under the Code

As regards conduct involving only verbal challenge of an officer's authority or criticism of his actions, misinformation given the officer, or warning or advice given to third persons, the Code's position that a pur-

130 MODEL PENAL CODE § 208.22(1)(a) (Tent. Draft No. 6, 1957).

131 MODEL PENAL CODE § 208.22, comment (Tent. Draft No. 6, 1957). Note that § 208.24 does establish an offense for a particular variety of oral misstatement: acts in the nature of reporting nonexistent crimes which would constitute "Wasting Enforcement Facilities." MODEL PENAL CODE § 208.24(2) (Tent. Draft No. 6, 1957).

132 MODEL PENAL CODE § 208.25(1)(c), (d) (Tent. Draft No. 8, 1958).

133 MODEL PENAL CODE § 208.26 (Tent. Draft No. 8, 1958). Comparable state statutes include N.Y. PEN. LAW §§ 2440, 2441; OKLA. STAT. ANN. tit. 21, § 546 (1951).

134 MODEL PENAL CODE § 208.26 (Tent. Draft No. 8, 1958).

posive, substantial risk of bodily harm must be created before the offense can be made out, seems best to balance the several competing interests. All such activity operates, of course, to impair the working efficiency of government agents—whether it misdirects or merely demoralizes the policeman, makes him the target of a bullet or only of public ridicule. Yet the countervailing danger that would lie in the stifling of all individual power to resist—the danger of an omnipotent, unquestionable officialdom —demands some sacrifice of efficiency to the embarrassing, the misconceived, even the vicious forces of private opposition. If the police official needs a certain sphere of flexibility and permissible error, so too does the citizen: the latter must be able to complain, to criticize and to question without running the risk that if subsequent judicial deliberation adjudges his communications technically erroneous in point of law, he may be punished for having made them. It may be convincingly argued that to allow the challenge of police actions is conducive to the improvement of the quality of those actions;[135] but the strongest case for allowing challenge is simply the imponderable risk of abuse—to what extent realized it would never be possible to ascertain—that lies in the state in which no challenge is allowed.[136] Similarly, to penalize per se the misinforming of an officer, to invest the policeman with the power of a court to compel truth and thus to expand the realm of punishable perjury from the cautioning solemnity of statement under oath into the casual conversation of street corners, taverns or homes, is a proceeding whose dangers far outweigh its conceivable utility. Probably unenforceable in practice, its greatest effect might well be to arouse public hostility and uncooperativeness toward the police.

The prospect of application of the obstruction concept to punish one who advises another to do an act obstructive of official functioning highlights perhaps most clearly that throughout the whole range of verbal conduct considered, constitutional free speech safeguards apply.[137] In specific instances the first or fourteenth amendments themselves may prohibit the imposition of penal sanctions: consider the case of the advisor who counsels persons under arrest to remain silent until they can procure legal representation.[138] But even where oral communications fall without the pale of the amendments' protection—whether because creating a "clear

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[135] See CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); *cf.* Near v. Minnesota, 283 U.S. 697 (1931); Feiner v. New York, 340 U.S. 315, 328 (1951) (dissenting opinion).

[136] Of course, the necessity for preserving the right of the individual to criticize does not justify leaving him totally irresponsible to harass police with obscene and abusive language. While not within the scope of § 208.31, extreme profanity or boisterousness might legitimately be brought within some other offense, perhaps disorderly conduct, which might be so defined as to provide an appropriate standard of criminality specifically regarding such conduct.

[137] See People v. Pilkington, 199 Misc. 665, 103 N.Y.S.2d 64 (Broome County Ct. 1951), where the court refused to apply an ordinance whose operative words were "harm, obstruct or resist" because to do so would endanger the right of free speech. See also People v. Weissman, 138 Misc. 542, 247 N.Y. Supp. 372 (Ct. Spec. Sess. 1930).

[138] *But cf.* Rex v. L., 51 Ont. L.R. 575, 69 D.L.R. 618 (1922).

and present danger that they will bring about the substantive evils that [the legislature] has a right to prevent," [139] or because they are of the class of "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" [140]—the intendment of the amendments may suggest, as a principle of value, that penal legislation should not push to the very limits of constitutional protection.[141] The amendments, of course, prescribe mere *minima* of liberty: it is not every substantive evil within the power of the legislature to prevent whose possible occurrence *should* justify restraint upon expression. These considerations are admittedly strongest as regards those kinds of conduct which have been classified as arguing with or criticizing officials or advising third persons, where possible impediment of the dissemination of truth [142] is most threatened by overhanging criminal sanction. There is perhaps less social value in permitting warnings—communications which, by alerting violators or prospective violators of the law that police are on the scene, permit escape or the destruction of evidence. Such activity may be difficult to punish under accomplice principles—precisely because it often makes impossible proof of the substantive crime. But to punish warnings as obstruction presents a number of serious problems. Is distinction to be made between a warning which prevents commission of a crime and a warning which prevents apprehension? To punish all instances of the former would be self-defeating in a criminal jurisprudence that aims at deterrence. But on what grounds is the distinction to be made? Is it to turn upon fortuities of timing? Or, as has been suggested,[143] upon intention or motive? The latter seems administratively unworkable. Furthermore there is the danger that, if prosecution under an obstruction provision be allowed, a prosecutor who has some doubt as to his ability to make out a case for liability of some more serious crime under accomplice doctrine may use the obstruction statute and settle for a lesser penalty, whereas the interests of effective and even-handed criminal administration would seem better served by the accomplice prosecution.[144] Much of warning behavior

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[139] Schenck v. United States, 249 U.S. 47, 52 (1919). See also Debs v. United States, 249 U.S. 211 (1919). These cases, the progenitors of the clear and present danger doctrine, arose under an obstruction statute, Espionage Act of 1917, tit. 1, § 3, 40 Stat. 219.

[140] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[141] In some circumstances the amendments themselves may prohibit the legislature from crowding the individual to their very limits by vague and general penal laws which force him to guess the location of those limits at his peril. Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940). In light of the inconsistent invocation of the obstruction principle, both as among the jurisdictions and within particular jurisdictions, it seems hardly necessary to insist upon the vagueness of obstruction legislation.

[142] See generally CHAFEE, *op. cit. supra* note 135, at 149; Mill, *On Liberty* in GREAT LEGAL PHILOSOPHERS 381 (Morris ed. 1959).

[143] Bastable v. Little, [1907] 1 K.B. 59, 63 (1906).

[144] For the potential dangers of allowing wide prosecutorial discretion see generally Note, 103 U. PA. L. REV. 1057 (1955); Note, 65 YALE L.J. 209 (1955).

may in any event be undeterrable, as motivated by forces of loyalty which are too strong to be suppressed by any punishment short of the most severe; and very severe penalties for warnings, even if deemed appropriate by the legislature, are very liable to jury nullification.

But to consider the applicability of the Code to specific isolated categories of behavior and to assess the merits of its position in terms of the social value or social detriment of each category as a category is, to a great extent, precisely to belie the genius of the Code. For the Code attaches liability to no particular act or acts: it penalizes any and all acts which are performed with the requisite intent and whose commission has the requisite risk-creating consequences. In its failure to specify isolable instances of conduct, it is like the general obstruction statutes; but, unlike them, it supplies in terms of the *effect* of conduct a single, objective standard. That standard—substantial risk of bodily harm to the officer or to anyone else—seems not only constitutionally unassailable,[145] but normatively reasonable. It may not draw as sharp a line of discrimination as would be the ideal of a penal provision, but the line it draws seems as sharp as the area permits. As regards the purposive creation of substantial risk of bodily harm, Justice Holmes' observation is apposite: although "the precise course of the line may be uncertain, . . . no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." [146]

This discussion assumes that verbal acts which fail to create a substantial risk of bodily harm are not made punishable under the Code by operation of the second disjunctive phrase of section 208.31. While it might conceivably be argued that one who by the use of words causes another to act in such a manner as to require or justify a public officer's use of substantial force, although no substantial risk of bodily harm to the officer or any other is created, falls within the meaning of the section, this reading seems implausible. Such situations will in any event be rare, inasmuch as it will probably seldom occur that the activity of the third person, if it justifies the use of substantial force by the officer, will not ipso facto create a substantial risk of bodily harm to the third person himself, as object of the officer's use of force. But where such a circumstance does arise—as in the case, perhaps, of one who advises or warns a third party to lock a door against entering officers, so that the door has to be broken in—it is suggested that the intendment of the section excludes it. Section 208.31 is by its title directed specifically at resisting arrest or other law enforcement. Within this context it punishes the *employment of means* which justify the use of force *to overcome*. The means themselves must be susceptible to, and must demand, being overcome by force. It would seem difficult under the section to make out a case against merely verbal acts.

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145 Feiner v. New York, 340 U.S. 315 (1951). See DRINKER, SOME OBSERVATIONS ON THE FOUR FREEDOMS OF THE FIRST AMENDMENT 6-19 (1957).

146 United States v. Wurzbach, 280 U.S. 396, 399 (1930).

Punishment of Physical Acts Under the Code

Through the dovetailing of sections 208.30 and 208.31, then, the Code makes—as the current general obstruction statutes fail to make—a sharp distinction between verbal and physical acts. While both, when creative of the requisite risk of harm, come under 208.31, the latter, and the latter only,[147] are susceptible of punishment under 208.30. Under that section, the operative words "obstructs, impairs or perverts" are reminiscent of common general obstruction language. Yet, even as it applies to the strictly delimited field of non-verbal activity, the Code's approach diverges in several particulars abruptly from that of the currently governing statutes.

In the first regard, the object of the obstruction punished by section 208.30 is not the officer himself, but the "administration of law or other governmental function." This concept would appear to foreclose *ab initio* judicial development of the obscure and impractical distinction presently made in some jurisdictions[148] between obstruction of the object of process and obstruction of the serving officer. More significantly, by eschewing definition in terms of the duties or authority of the particular official involved,[149] it may also foreclose, in prosecutions under 208.30, the enforcement court's inquiry into the precise technical legality of authorization of that official. Thus, while it offers what seems an adequate safeguard against purely arbitrary action by public officers—inasmuch as one who opposes acts of an officer which are wholly without color of law or in substantial violation of the opponent's or others' constitutional or statutory rights would not appear to obstruct the administration of law or other governmental function—the section does not embody the ritualistic doctrine which, although punishing the slightest physical scuffling against an authorized officer, justifies even serious assault and battery against an officer serving formally defective process.[150] In this connection, however, the Code explicitly exempts from the stricter standards of section 208.30, *inter alia*, "refusal to submit to arrest," which conduct is thus relegated for punishment, if at all, to section 208.31. The vagueness of the operative language here, which leaves unclear whether only the abstract construct of refusing *qua* refusing is excepted from 208.30 or whether all physical resistance, up to and including substantial battery, is also immunized if carried on as accessory to refusal, is unfortunate, for while section 208.31 of course catches up all activity threatening bodily injury, that section seems by its terms to remain subject to the technical clogs from which 208.30 is liberated. True, the "lawful arrest" and "other duty" language of 208.31

[147] Note, however, that if the manner of a verbal utterance is such as to render it illegal independently of the obstruction section—as, for example, disorderly conduct, see note 136 *supra*—the utterance may be read back into § 208.30 through the "other unlawful act" clause.

[148] See notes 119-20 *supra* and accompanying text.

[149] Compare OKLA. STAT. ANN. tit. 21, § 540 (1951) ("obstructs any public officer in the discharge [of] any duty of his office").

[150] See note 78 *supra* and accompanying text.

is in the "purpose" clause, rather than the effect clause, of that section, and therefore fails to clarify whether there is penalized behavior whose purpose is to prevent an arrest *in fact* lawful or, more broadly, any arrest which the person resisting has no reason to believe is not lawful. But there remains the possibility, on the language of the Code, that battery of an officer may escape 208.30 as incident to a refusal to submit to arrest [151] and, though creating substantial risk of bodily harm, escape section 208.31 through technical defectiveness of an arrest warrant. The problem of balancing the countervailing pressures in this area is a difficult one. The compelling interest in leaving unpunished private resistance to the illegal exercise of authority is counterweighted by the inadvisability of allowing justification on the grounds of insignificant matters of form. Moreover, varieties of resistance are not of a piece. While a given technical defect of process may be deemed too insignificant to justify physical attack on the serving officer, it may well justify flight or other evasion. The scheme of the Code, although more successful than that of current law under obstruction and resistance statutes, seems nevertheless insufficiently articulate to cope with this problem.

On the other hand, the Code's treatment of the problems of flight and of non-affirmative avoidance of compliance with law seems both reasonably conceived and effectively accomplished. The comment to 208.30 explains that the rationale for excepting instances of flight from that section is that police have the right to pursue and to use adequate force to effect arrest and that, once arrested, the fugitive may be prosecuted for the original offense; if he cannot be convicted of that, it is said, "it would be unjust and conducive to grave abuse to permit prosecution for an unsuccessful effort to evade the police." [152] In fact, flight from enforcement officers may well be an undeterrable activity: persons who have reason to believe that they will be convicted of a substantive offense are unlikely to be dissuaded from fleeing by the imposition of an additional thirty days to whatever sentence they already fear, and those who have only cause to deem themselves entirely innocent are likely to feel so terrified, indignant or righteous that their impulse to get out of the grip of officers will be little susceptible of control. And to allow a vehicle by which a prosecutor may, on the one hand, take the easy road to minor conviction of one whom, with more assiduity he might prove guilty of a substantive offense and, on the other, harass one whom he cannot prove guilty of that offense, seems ill-suited to effective criminal administration. The state's case against one who does no more than flee should stand or fall with its ability to convict him of the principal crime in connection with which his detention was sought. The most, in addition, that it is reasonable to demand of him is

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[151] MODEL PENAL CODE § 208.30, comment 5 (Tent. Draft No. 8, 1958), indicates that the intent of the exception extends to one "who runs away from an arresting officer or who makes an effort to shake off the policeman's detaining arm." Query whether the language of the section itself is necessarily so limited.

[152] MODEL PENAL CODE § 208.30, comment 5 (Tent. Draft No. 8, 1958).

that the means of his flight be such as not to constitute a danger to others; this demand is vindicated by his liability under the risk-creation provision of section 208.31.

Likewise, the exemption from section 208.30 of "failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions," seems well reasoned. The clear intendment of the exception is to assure that neither through employment of the obstruction provision alone, nor through issuance by any public officer of orders whose enforcement may subsequently be sought under the obstruction provision, can there be laid upon the individual a positive obligation to assist in the procedures of administration of the law, or to cooperate in or facilitate those procedures. A few jurisdictions have by statute imposed such an obligation, at least to the extent of making the citizen responsible to help effect an arrest when called upon to do so.[153] But these endeavors to compel cooperation through penal coercion will probably be of little effect as regards persons who, whether timorous of or sympathetic toward the arrestee, would be disinclined to offer aid on their own initiative; and there exists the danger that police will be encouraged to pass the executive buck. Apart from such attempts to involve the individual as a participant in the administrative enforcement machinery, orders issued by public officers will operate in two distinct settings: where the order commands the doing or not doing of an act which is prescribed or prohibited by law independent of the officer's order; or where the order commands behavior not otherwise legally required, but which would aid or implement the officer's accomplishment of his duties. In the former situation, where an order directs an affirmative act which constitutes the termination of a state of being already in violation of some provision of law, non-compliance is of course punishable as violation of that provision, and the cumulation of another penalty for obstruction adds nothing but the possibility of prosecutorial abuse. Orders of the second variety—those which seek to compel behavior upon the authority of the officer alone—have frequently been enforced by convictions for non-compliance with them under the general obstruction statutes.[154] Yet there are significant reasons to strictly limit the power of the police and other officials in this regard. Where non-compliance with an officer's order occurs in a situation where the non-complier is himself the object of the officer's attempts at law enforcement, considerations analogous to those underlying the constitutional self-incrimination safeguards often come into play. While the law presently limits these safeguards to the specific situation of oral testimony,[155] some of the evil aimed at by the fifth amendment—the indignity of forcing an individual to be the agent of his own subjection to the enforcement procedures of

[153] See, *e.g.*, MASS. STAT. ANN. tit. 268, § 24 (1956); N.C. STAT. ANN. § 14-224 (1953). None of these statutes seems ever to have been judicially interpreted.

[154] See notes 100-13 *supra* and accompanying text.

[155] See, *e.g.*, United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954).

the law [156]—may be present in instances of refusal to comply with police orders.[157] But even in circumstances in which these considerations are not present—as where an individual insists on standing by while the police are questioning others,[158] or refuses to move along as ordered [159]—there is frequently a social value in permitting private persons to stand their ground. As it is desirable to preserve an opportunity of verbal criticism as a curb against potential police abuses, so it is desirable that members of the public be allowed to post themselves where they will and to observe police action. To place in the hands of every officer a power to create affirmative duties, to tailor them to the felt needs—and, indeed, to the immediate passions—of the situation, and to impose them upon selected individuals is a practice full of possibilities of prejudiced and arbitrary action. Yet, on the other hand, because the metaphysical line between activity and non-activity is often neither clear nor determinative of practical consequences, because the mere presence of persons on a scene may often pose a substantial threat to the public safety, the individual cannot be left completely free to decline to act upon police command. In such a case—as where groups of persons block the street and prevent passage by others [160] or by the officers,[161] or threaten to erupt into violence or to precipitate riot [162]—the Code's substantial-risk-of-bodily-harm provision, section 208.31, seems well adapted to afford the necessary instrument of control.

R. J. K.

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[156] See, *e.g.*, Horowitz, *The Privilege Against Self-Incrimination—How Did it Originate?*, 31 TEMP. L.Q. 121 (1958).

[157] See, *e.g.*, Speck v. State, 34 Ala. App. 325, 41 So. 2d 198, *cert. denied*, 252 Ala. 513, 41 So. 2d 200 (1949).

[158] See, *e.g.*, State v. Taylor, 38 N.J. Super. 6, 30, 118 A.2d 36, 48 (App. Div. 1955), in which such standing by was held to be "interference."

[159] Rex v. Golden, 51 B.C. 236, [1937] 1 D.L.R. 350 (Ct. App. 1936); The King v. Leclaire, 12 Can. Crim. Cas. Ann., 332 (Que. K.B. 1906). In both cases defendant refused to move when ordered to do so and was found guilty of "obstruction."

[160] Despard v. Wilcox, 102 L.T.R. (n.s.) 103 (K.B. 1910); Pankhurst v. Jarvis, 101 L.T.R. (n.s.) 946 (K.B. 1909). In both cases a large group of suffragettes completely blocked the street; held criminal.

[161] See Commonwealth v. Baltzley, 11 Pa. D. & C.2d 235 (Quarter Sess. 1956), where, according to the indictment, defendants formed a human chain across the road preventing the sheriff from proceeding on to break up a riot. On demurrer this indictment was upheld, but upon trial it appeared that the sheriff was leading a caravan of cars containing strikebreakers and the court directed a verdict for defendants, apparently on the ground that the sheriff was not performing his duty.

[162] It should be pointed out that this rationale may justify the result, if not the language, of State v. Taylor, 38 N.J. Super. 6, 118 A.2d 36 (App. Div. 1955), since the court points out that all the bystanders including defendant were Negroes, the police were white, and the occurrences took place during a time of racial uneasiness.